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No. 90-157

In The

Supreme Court of the United States

October Term, 1990

TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND,

Petitioners,

v.

CENTRIC CORPORATION,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court will permit petitioners to argue the merits of their case when the courts below found that petitioners were barred from pursuing their claims due to admitted oversight and neglect, inexcusable delay, and undue prejudice resulting from failure to pursue claims in a timely manner.

2. Whether the courts below abused their discretion in barring petitioners' claims, based on the defense of laches.

3. Whether respondent's request for declaratory relief and request for stay of arbitration proceedings, and the subsequent filing of bankruptcy, tolled the obligation to request arbitration.

4. Whether respondent's initiation of judicial proceedings rather than arbitration foreclosed it from raising any and all defenses to petitioners' withdrawal liability assessment; and whether the court below was correct in finding that certain defenses, including the defense of laches, remain available notwithstanding the failure to initiate arbitration in the circumstances of this case.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Centric Corporation has no parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 6

I. Petitioners' Request For Certiorari Is Based On An Issue Not Reached By The Tenth Circuit Court Of Appeals 6

II. Petitioners' Contention That There Exists A Growing Split Among The Circuits Is Incorrect And Unfounded 10

III. This Case Does Not Present Important Issues Worthy Of The Court's Consideration 18

IV. The Decision Of The Tenth Circuit Court Of Appeals, Affirming Decisions Reached By The Bankruptcy Court And The District Court, Was Correct 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc., 615 F.Supp. 1063 (D.Colo. 1985) 16, 17

Central States Southeast and Southwest Areas Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987) 14

Crown Cork and Seal Company, Inc. v. Central States Southeast and Southwest Areas Pension Fund, 881 F.2d 11 (3rd Cir. 1989) 13, 14

Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia, 830 F.2d 1241 (3rd Cir. 1987) 14

Grand Union Co. v. Food Employers Labor Relations Association, 808 F.2d 66 (D.C.Cir. 1987) 13, 14

I.A.M. National Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 8 EBC 2089 (D.C.Cir. 1987) 12, 17

I.A.M. National Pension Fund v. Slyman Industries, Inc., 901 F.2d 127 (D.C.Cir. 1990) 17

ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc., 846 F.2d 879, 9 EBC 2326 (2nd Cir. 1988) 12, 13, 17

IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3rd Cir. 1986) 12, 17

Mason and Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund, 852 F.2d 156 (6th Cir. 1988) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 693 F.2d 290 (3rd Cir. 1982) 13

Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628 (4th Cir. 1983) 16

Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054 (7th Cir. 1988) 12

Robbins v. B and B Lines, Inc., 830 F.2d 648 (7th Cir. 1988) 12

Robbins v. Chipman Trucking, Inc., 866 F.2d 899 (7th Cir. 1988) 12

T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds, 756 F.2d 939 (2nd Cir. 1985) 14

Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc., 888 F.2d 1161 (7th Cir. 1989) 13, 17

Trustees of the Colorado Pipe Industry Pension Trust v. Howard Electrical and Mechanical, Inc., 88-2938 (10th Cir. May 18, 1990) 13, 15

Western Teamsters Pension Trust Fund v. Allyn Transportation Co., 832 F.2d 502 (9th Cir. 1987)..... 12

STATUTES

11 U.S.C. §362(a) 3

Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. §1381, *et seq*..... 2

Section 4221 of the Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. §1401 .. *passim*

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OPINIONS BELOW

References to the reported Tenth Circuit and unpublished opinions below appear at pp. 1-2 of the Petition for Writ of Certiorari.

Texts of the opinions below appear in the Appendix to the Petition for Writ of Certiorari, pp. 1-33.

STATEMENT OF THE CASE

By letter dated April 7, 1983, the trustees of the Centennial State Carpenters Pension Trust Fund, petitioners in the instant case, notified Centric Corporation, respondent, that Centric was being assessed $372,775 in pension withdrawal liability, pursuant to the then recently enacted Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. § 1381 *et seq*. The assessment was claimed because Centric was no longer signatory to the union's collective bargaining agreement, and therefore no longer contributing to the union pension fund.

It was Centric's belief that the trustees' attempt to assess withdrawal liability pursuant to the MPPAA was unconstitutional on its face, and therefore unenforceable against withdrawing employers; and, that the MPPAA was inapplicable to Centric because of the statute's labor dispute exception. Based on these contentions, Centric filed for declaratory relief in the United States District Court for the District of Colorado.

The complaint filed by Centric included a request for stay of arbitration proceedings until the constitutional and statutory interpretation issues had been resolved by the court. The complaint was filed within the time limits set forth in Section 4221(a)(1) of the MPPAA, 29 U.S.C. §1401(a)(1), for resolving disputes concerning a determination of withdrawal liability.

The trustees filed a counterclaim for collection of the assessed withdrawal liability. Although the court did ultimately deny Centric's motion for summary judgment on the constitutional issues, the statutory interpretation of

the labor dispute exception had not yet been resolved at the time bankruptcy proceedings were initiated by Centric on July 3, 1985. The district court action was stayed on August 16, 1985 pursuant to the automatic stay provision of the U.S. Bankruptcy Code, 11 U.S.C. §362(a).

On April 15, 1986, more than nine months after the bankruptcy petition was filed, the trustees filed a proof of claim with the bankruptcy court in the amount of their withdrawal liability assessment. On the same day, the trustees also requested relief from the automatic stay in order to pursue their counterclaim in the district court. That relief was granted on May 13, 1986. However, after indicating an intent to pursue their claim in both forums, the trustees followed-up in neither.

In May 1987, the trustees and other creditors were ordered to respond to Centric's objections to creditor claims on or before June 29, 1987. A hearing was set for August 10, 1987, at which time creditor claims and debtor objections were to be resolved. The trustees did not respond to Centric's objection to their claim, nor did the trustees participate in the hearing.

On January 29, 1988, more than seven months after the trustees' response was due, the trustees requested permission to file a late response. The bankruptcy court denied this motion, stating that their request to respond was extremely tardy, was the product of simple oversight and neglect, and that allowing the response would send a message to creditors and the bar alike that schedules, timelines and bar dates are not of importance in

bankruptcy proceedings. (App. p. 25)[1] The trustees appealed this decision to the district court.

In the meantime, on January 29, 1988, more than twenty months after requesting and receiving permission to pursue their counterclaim in district court, and approximately thirty months after the bankruptcy was filed, the trustees moved to reopen the district court proceedings. Although the case was administratively reopened on February 8, 1988, the district court ultimately dismissed the counterclaim, stating that the failure of the trustees to prosecute the counterclaim for more than twenty months after getting a relief from stay was inexcusable, and that proceeding with the litigation would cause substantial detriment to Centric. (App. p. 18) The trustees appealed this ruling to the Tenth Circuit Court of Appeals.

In its appellate role of reviewing the bankruptcy court decision, the district court held that the determination of the bankruptcy judge constituted a procedural rejection of the claim, without reference to the underlying merits of the basis for the claim, and was an effective disposition of the claim. (App. p. 20) The trustees also appealed this ruling to the Tenth Circuit Court of Appeals.

The Tenth Circuit consolidated the appeals and affirmed both decisions, finding no reversible error and no abuse of discretion.

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[1] To avoid needless duplication, respondent has not reprinted opinions below which are already provided in the appendix to petitioners' brief. All citations to an appendix page number referenced in this brief correspond to the appendix page numbers set forth in petitioners' brief.

Additionally, the Tenth Circuit opinion took pains to discredit the trustees' erroneous factual premise that an order issued by the bankruptcy court on June 29, 1988, *nunc pro tunc* August 10, 1987, was relevant to the issues before the court.

However, the trustees have persisted in providing to this Court, in their Statement of the Case, erroneous facts regarding the *nunc pro tunc* order, even though both the district court and the Tenth Circuit Court have pointed out that the *nunc pro tunc* order did not deal with the trustees' claim.

As stated by the district court, sitting in appellate review of the bankruptcy court:

> The appellants also contend that the bankruptcy judge erred in signing an order disallowing claims on June 29, 1988, nunc pro tunc August 10, 1987. The issuance of that order, nunc pro tunc or otherwise, is irrelevant to the denial of the appellants' motion to file a late response to the debtor's objection to the claim.

(App. p. 20) The district court concluded that the bankruptcy court determination was "an effective disposition of the claim, independently of the June 29, 1988, order." (App. p. 20)

Likewise, the Tenth Circuit Court of Appeals held that "the court did issue an order *nunc pro tunc* on June 29, but that order did not deal with the Trustees' claim. . . . The June 29 order is completely irrelevant to the Trustees' claim." (App. p. 5, ftn. 3)

Petitioners had an opportunity to litigate their claim for withdrawal liability in both the bankruptcy court and

the district court, and failed to do either in a timely fashion. Neither the bankruptcy court nor the district court had an opportunity to determine the merits of the trustees' claim because petitioners failed reasonably to pursue the claim in either forum. When the trustees finally asked the bankruptcy court for permission to file a tardy response, the motion was denied on procedural grounds rather than on the merits. Likewise, the district court never reached the merits of either Centric's remaining claim or the trustees' counterclaim because it found that the trustees' delay of more than twenty months in pursuing the withdrawal liability assessment was inexcusable and would cause substantial detriment.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. Petitioners' Request For Certiorari Is Based On An Issue Not Reached By The Tenth Circuit Court Of Appeals.

Petitioners have tried to frame the issue before this Court as an ERISA public policy question, citing in their brief congressional policy favoring the protection and preservation of employees' retirement benefits, and arguing that other policy considerations must give way to the policies underlying the MPPAA. (Pet. pp. 7-9) This is totally inappropriate.

It is clearly apparent from a review of the Tenth Circuit decision, and the district court and bankruptcy court decisions below, that the issue is not one of public policy or substantive issues, but rather one of petitioners'

untimeliness and inexcusable neglect in failing to pursue their claim to collect a withdrawal liability assessment through either of two forums in which they had an opportunity to do so. Petitioners filed a proof of claim in the bankruptcy court in the amount of their withdrawal liability assessment, and also had a counterclaim pending for the same amount in federal district court, in response to the action in which Centric had filed for declaratory relief.

The trustees' appeal of the bankruptcy court's ruling to the district court, and their appeal of both district court rulings to the Tenth Circuit Court, all turn on whether the lower courts abused their discretion in rejecting or dismissing the trustees' attempts to pursue untimely claims. None of the lower court rulings was based on the merits of the trustees' claim for withdrawal liability. Instead, they were based on issues of failure to prosecute, attorney neglect, docket control, case management and the equitable defense of laches.

When the bankruptcy court rejected the trustees' request to file a tardy response some seven months after it was due, the court did not address the merits of the trustees' claim, or any public policy issues involving the MPPAA and the protection of employee benefit programs. The bankruptcy court held:

> To grant the Motion to Respond will, inevitably, cause continuing confusion in an already disrupted bankruptcy case, further dissipate an estate already too inadequate to allow distribution to unsecured creditors, and send a message to creditors and the bar alike that schedules, timelines, and bar dates are not of importance in bankruptcy proceedings.

(App. p. 25)

As the district court pointed out in its affirmance of the bankruptcy judge's order, "the determination made by Bankruptcy Judge Brooks constitutes a procedural rejection of the claim, without reference to the underlying merits of the basis for the claim and is an effective disposition of the claim . . . " (App. p. 20)

The Tenth Circuit also quoted the above language from the bankruptcy court opinion, and noted that the only ground for reversal could be an abuse of discretion. After reviewing the authority relied upon by both the district court and the bankruptcy court, and their analysis of the various factors involved, the Tenth Circuit held that the district court correctly determined that the bankruptcy court did not abuse its discretion when it denied the trustees' motion.

Likewise, the district court dismissed petitioners' counterclaim for an alleged amount due and owing based on the fact that the trustees waited approximately thirty months to pursue their pending counterclaim after the bankruptcy petition was filed.[2] The court found that "those factors concerning the allowance of a tardy claim in bankruptcy are controlling on the laches question in this civil action." (App. p. 17) The court continued:

> What is apparent here is that despite the issuance of the order granting relief from stay, thereby permitting the trustees to prosecute their counterclaim in this civil action, the

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[2] It was almost ten months before the trustees requested that the automatic stay be lifted, and more than twenty months after the stay was lifted before the trustees requested that the district court case be reopened.

> trustees' former legal counsel decided to proceed through the proof of claim filed in the bankruptcy proceedings and then neglected to prosecute that claim in a timely manner. . . . [T]he failure of the trustees to prosecute the counterclaim here for more than 20 months after receiving the order granting relief from stay is inexcusable and would cause substantial detriment to the plaintiff by proceeding with the litigation of the counterclaim.

(App. pp. 17-18)

In reviewing the district court opinion, the Tenth Circuit made clear that the basis of the lower court ruling went to "the effect of the delay in bringing suit, not to the merits of the claim." (App. p. 10) The court held that it could not disturb a finding of laches unless the district court abused its discretion (App. p. 12); and ultimately concluded that the district court did not abuse its discretion. (App. p. 14)

The court's ruling was clearly based on an abuse of discretion standard. It concerned admitted attorney neglect, docket control and case management, rather than substantive issues or public policy questions. Abuse of discretion, and not public policy, has been and should continue to be the focus of appellate court review.

The focus of each court as the case progressed was not whether the trustees *could* have successfully argued the validity of their withdrawal liability assessment, but the fact that the trustees had the opportunity to do so – twice – in two different forums – and failed to do so until such time as it was determined to be unduly prejudicial to allow further proceedings to occur.

If this Court wishes to make new law or address public policy issues regarding the collection of withdrawal liability assessments pursuant to the MPPAA, this is not the appropriate case, nor the clear-cut factual circumstances, in which to do so.

II. Petitioners' Contention That There Exists A Growing Split Among The Circuits Is Incorrect And Unfounded.

Petitioners are asking the Court to clarify what they assert to be a growing split among the circuits on the issue of whether an employer who fails to arbitrate a withdrawal liability assessment waives all defenses to the assessment under Section 4221 of the MPPAA, 29 U.S.C. §1401. The assertion of a growing split, or of any split, is incorrect and unfounded.

The petitioners contend that there exists a growing split among the circuits as follows: (1) that the District of Columbia, Third, Sixth, Seventh and Ninth circuits have all adopted the position that when an employer fails to initiate arbitration, it waives all defenses to the plan sponsor's withdrawal liability claim, regardless of the circumstances; (2) that the Second Circuit holds that an employer must either seek judicial relief or initiate arbitration within the statutory time limits or waive all of its defenses to the withdrawal liability assessment; and (3) that a number of circuits have created other exceptions to the statutory requirement that an employer's failure to arbitrate results in a waiver of all defenses.

Petitioners' contentions are incorrect. It is not accurate that each circuit listed in petitioners' first group has adopted the narrow and absolute position that all

defenses to a withdrawal liability claim are waived in all circumstances when an employer fails to initiate arbitration. In fact, as set forth in more detail below, each circuit which has addressed the issue has recognized that exceptions exist to the MPPAA's statutory requirement to arbitrate.

Moreover, every circuit has been consistent where the facts indicate an employer ignored the assessment and/or failed to take *any* action within the statutory time limitations set forth in Section 4221(a) of MPPAA; and every circuit has been consistent where the facts indicate an employer acknowledged the assessment and sought judicial relief, rather than arbitration, prior to the expiration of the statutory time limitations set forth in Section 4221(a).

A split in the circuits is not created when courts reach different conclusions based on different facts. It is not unusual for courts to carve out exceptions or make distinctions when applying the same legal principles to different circumstances. Only if courts reach different legal conclusions when faced with the same fact patterns is a conflict generated.

In presenting a split of authority argument in the instant case, petitioners have simply ignored significant distinctions and fact patterns which have resulted in different outcomes where employers have been assessed withdrawal liability pursuant to the MPPAA.

Of primary interest is the distinction between cases in which the employer fails to take *any* action to initiate arbitration *or* to seek judicial relief prior to the expiration of the statutory time limits in Section 4221(a); and cases

in which the employer has not initiated arbitration but has taken some action to seek judicial relief prior to the expiration of the statutory time limit in Section 4221(a).

Contrary to the trustees' assertions, every case cited by petitioners has recognized and been consistent in its disposition of these two very factually distinct circumstances. The trustees have either failed to recognize this factual distinction or have misconstrued the case law in their attempt to create a split of authority among the circuits.

For instance, in the majority of cases cited by the trustees from the District of Columbia, Second, Third, Seventh and Ninth Circuits, the circumstances are significantly different from the instant case because the employer ignored the assessment and/or failed to take *any* action within the statutory time limitations set forth in Section 4221(a). In those cases, the courts have consistently held that the employer's failure to act in some way within the statutory time period foreclosed it from asserting any defenses to the withdrawal liability assessment.[3]

Those facts are contrary to the instant case in which Centric did take action within the appropriate time limits.

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[3] *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899 (7th Cir. 1988); *ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2nd Cir. 1988); *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054 (7th Cir. 1988); *Western Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502 (9th Cir. 1987); *Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987); *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C.Cir. 1987); *IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118 (3rd Cir. 1986).

Moreover, none of the cases cited by petitioners deals with an issue of laches where, as here, the defense was not yet available to the employer at the time relief was first requested.

In the remaining cases cited by the trustees from the District of Columbia, Second, Third and Sixth Circuits, where defenses were recognized, the facts show that the employer, *prior to the expiration of the statutory time limitations,* initiated judicial proceedings in the district court, raising as defenses one or more of the exceptions to the exhaustion of remedies doctrine applicable to withdrawal liability assessments under the MPPAA. The following exceptions have consistently been recognized throughout the referenced circuits[4] when some previous action has been taken by the employer:

> (1) Where the non-judicial remedy is inadequate to prevent irreparable injury; (2) Where there exists a question of statutory interpretation or constitutionality; (3) When exhaustion would be

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[4] *See, Trustees of the Colorado Pipe Industry Pension Trust v. Howard Electrical and Mechanical, Inc.*, 88-2938 (10th Cir. May 18, 1990); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989); *Crown Cork and Seal Company, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 881 F.2d 11 (3rd Cir. 1989); *Mason and Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 852 F.2d 156 (6th Cir. 1988); *ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2nd Cir. 1988); *Grand Union Co. v. Food Employers Labor Relations Association*, 808 F.2d 66 (D.C.Cir. 1987); *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3rd Cir. 1982).

> futile; and (4) Where the defense was not available to the employer at the time of the withdrawal liability assessment.

The fourth exception has also been found to be available to an employer who fails to take any action prior to the expiration of the statutory time limitations in Section 4221(a). *Crown Cork and Seal Company, Inc. v. Central States Southeast and Southwest Areas Pension Fund,* 881 F.2d 11 (3rd Cir. 1989); *Central States Southeast and Southwest Areas Pension Fund v. 888 Corp.,* 813 F.2d 760 (6th Cir. 1987).

In none of these remaining cases cited by petitioners did the courts foreclose the employers from going forward or raising the above defenses on the ground that they had not initiated arbitration. *See, Mason and Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund,* 852 F.2d 156 (6th Cir. 1988); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia,* 830 F.2d 1241 (3rd Cir. 1987); *Grand Union Co. v. Food Employers Labor Relations Association,* 808 F.2d 66 (D.C.Cir. 1987); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds,* 756 F.2d 939 (2nd Cir. 1985).

In the instant case, the district court found that Centric's complaint was filed within the appropriate statutory time frame. (App. p. 18) The Tenth Circuit did not find it necessary to make a finding regarding this issue since it disposed of the case on other grounds. It did state, however, that Centric's defense of laches applied whether or not the time for arbitration had passed.

Petitioners have cited no case in any circuit which holds that all defenses are barred when some timely

action has been taken by the employer. There is no split in the circuits.

The Tenth Circuit has been consistent in every respect with other circuits. For instance, in *Trustees of the Colorado Pipe Industry Pension Trust v. Howard Electrical and Mechanical, Inc.*, 88-2938 (10th Cir. May 18, 1990), the court found that the employer did not initiate arbitration over a disputed withdrawal liability assessment, nor did it take any action prior to the expiration of the statutory time limitations in Section 4221(a) of the MPPAA. Because the employer failed to do anything, the Tenth Circuit held, consistent with other circuits, that the employer was precluded from raising any defenses to its withdrawal liability assessment, and directed the district court to enter summary judgment in favor of the trust fund.

On the other hand, Centric, prior to the expiration of the time limitations set forth in Section 4221(a) of the MPPAA, initiated judicial proceedings challenging the constitutionality of the MPPAA and raised the additional defense that it was exempt from a withdrawal liability assessment under the labor dispute exemption of the MPPAA. Although the district court dismissed Centric's constitutional challenge, it never had an opportunity to rule on Centric's labor dispute exemption issue, due to Centric's bankruptcy filing.

A good example of petitioners' failure to recognize this factual distinction is their ultimate reliance on the specific cases cited in the concluding paragraph of their split of authority argument, at pp. 16-17 of petitioners' brief. In each of those cases, the employer failed to take any action, judicial or otherwise, prior to the expiration

of the statutory arbitration time limits. On that basis, each court held that the employer waived any defenses it might have had to the withdrawal liability assessment.

Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc., 615 F.Supp. 1063 (D.Colo. 1985), was one of the cases cited in petitioners' concluding paragraph. It is a case from the same district as the instant case. *Woodworkers* recognized and discussed at some length the difference between an employer who initiates arbitration or seeks judicial relief through the courts prior to the expiration of the statutory arbitration time limits under Section 4221(a); and an employer who takes no action to initiate arbitration or pursue judicial relief until after the expiration of the statutory arbitration time limits outlined in Section 4221(a).

Relying upon the Fourth Circuit's decision in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), the court recognized in *Woodworkers* that where an employer files its district court action before the statutory period for the arbitration requirements has run, the pendency of the litigation tolls the running of the period prescribed in Section 4221(a) of the MPPAA.

> Unlike *Republic Industries v. Teamsters, supra,* I find that Woodworkers failed to initiate arbitration on the issue of calculation within the time periods prescribed by Section 1401(a)(1). I further find that the defendant did not file a district court action within the limitation periods in Section 1401 and thereby failed to toll the statute of limitations.

Woodworkers, supra, at 1068. *See also, Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc.,* 888 F.2d 1161, 1164 (7th Cir. 1989); *ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.,* 846 F.2d 879, 9 EBC 2326, 2334 (2nd Cir. 1988); *I.A.M. National Pension Fund v. Clinton Engines Corp.,* 825 F.2d 415, 8 EBC 2089, 2101-2102 (D.C.Cir. 1987); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118, 129 (3rd Cir. 1986).

The circuit courts have consistently held the judicial filing procedure pursued by an employer, such as respondent, tolls the statutory arbitration time limits under Section 4221(a) and preserves the defenses available to it.

A final disposition of the issues raised by Centric in the district court was never reached due to Centric's bankruptcy filing. Centric's request for a stay of arbitration was never denied, and the statutory arbitration time limits continued to be tolled. *See, I.A.M. National Pension Fund v. Slyman Industries, Inc.,* 901 F.2d 127 (D.C.Cir. 1990); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc.,* 888 F.2d 1161 (7th Cir. 1989).[5]

Petitioners' assertion that there is a growing split among the circuits with respect to the issue of barring all

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[5] The Trustees have relied on these cases to establish that Centric's bankruptcy "did not toll the period of time in which Centric was required to initiate arbitration." (Petition for Writ of Certiorari, p. 15 at note 1). However, both cases clearly show that the time limitations period was in fact tolled for the party who filed for bankruptcy protection.

defenses is simply not true. The trustees seek to manufacture an alleged split by failing to recognize the underlying factual distinctions in the cited cases. The Tenth Circuit has ruled that a defense of laches was available under the circumstances presented in this case. In the context of the MPPAA, no other court has ever ruled on a defense of laches resulting from failure to prosecute, admitted attorney neglect, abuse of discretion, case management and docket control.

III. This Case Does Not Present Important Issues Worthy Of The Court's Consideration.

This case is factually unique. The circumstances involved in this litigation are peculiar to these parties and are not likely to occur in any other case. Supreme Court review of this case would have little, if any, precedential value.

The critical facts upon which the lower courts' decisions were based included primarily petitioners' "delay in the extreme, not once but twice." (App. p. 24) The issues before this Court and the courts below would not have arisen, but for the fact that the petitioners sat on their rights and failed to timely pursue collection of their withdrawal liability assessment in two different forums in which they had an opportunity to do so. Substantive issues were never reached by the Tenth Circuit Court of Appeals because of petitioners' inexcusable delay.

Certiorari should not be granted because the case fails to present clear-cut, focused or meritorious issues of a substantive nature. The issues which have been

addressed in this case are not issues of widespread interest or significant value to the legal community or the public at large. If the court wishes to clarify procedural aspects of the MPPAA, a more factually sound case should be found in which to do so.

More significantly, granting certiorari under these circumstances would reinforce the lower court's concern that allowing petitioners to proceed "send[s] a message to creditors and the bar alike that schedules, timelines, and bar dates are not of importance in bankruptcy proceedings." (App. p. 25)

IV. The Decision Of The Tenth Circuit Court Of Appeals, Affirming Decisions Reached By The Bankruptcy Court And The District Court, Was Correct.

The Tenth Circuit was required to affirm the lower court decisions unless it found that the court committed reversible error or abused its discretion. After reviewing the lower courts' analysis and reliance on appropriate case authority, the Tenth Circuit had no choice but to affirm the lower court rulings when it found that the district court committed no reversible error, that the bankruptcy court acted within its discretion when it denied the trustees leave to respond tardily to Centric's objection to their claim, and that the district court did not abuse its discretion by holding the trustees' withdrawal liability claim barred by laches. (App. p. 14)

This Court is also bound to uphold the opinions issued below, unless the decisions were clearly erroneous or an abuse of discretion. Decisions based on factors and analyses within the lower courts' discretion, related to

docket control, case management, and undue prejudice to the parties are not issues which should be addressed by this Court.

Concerning the propriety of laches as an available defense in such an action, the courts have carefully distinguished cases holding that no defenses are available to a claim for withdrawal liability, from other circumstances, such as the instant case, in which failure to arbitrate does not preclude the employer from raising other defenses.

As is noted in more detail above in respondent's argument asserting lack of conflict among the circuits, there are indeed some cases in which employers have been barred from raising defenses to a withdrawal liability assessment, but each and every circuit which has addressed the issue recognizes that there are legitimate exceptions to the statutory provision requiring arbitration. None of the cases dealing with withdrawal liability defenses includes the unique facts or resulting legal determinations present in the instant case.

Cases barring all defenses have been raised only in the context where the employer ignored or failed to utilize the arbitration provisions, and also did nothing else to protect its defenses until after collection proceedings were initiated. In the instant case, Centric as plaintiff recognized the obligation to arbitrate a dispute concerning a determination of withdrawal liability, but argued to the court in its declaratory judgment action that before a determination could be made regarding the amount of liability, it must first be determined if the statutory provisions were constitutional, and if the MPPAA was even applicable to Centric.

Centric filed its action prior to the deadline for requesting arbitration, and specifically requested the court to stay arbitration proceedings until the constitutional and statutory interpretation issues were resolved. The request was not denied. These circumstances are clearly distinguishable from cases in which the employer made no attempt to determine the applicability of the statute or the amount of its liability within the time frame set forth in the statute. In any event, the Tenth Circuit concluded that the laches defense was available to Centric whether or not the time for arbitrating disputes concerning withdrawal liability had passed. Petitioners have cited no circuits which have held otherwise.

CONCLUSION

Based on the foregoing, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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